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No. 06-667

IN THE

Supreme Court of the United States

JUSTINE MALDONADO,
Petitioner,

v.

FORD MOTOR COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Michigan

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The trial court dismissed petitioner's lawsuit as a sanction for the flagrant misconduct of petitioner and her counsel, who together deliberately and repeatedly publicized through the media, shortly before anticipated trial dates, prejudicial information that the court had ruled inadmissible. The trial court found that petitioner and her counsel acted willfully and for the purpose of tainting the potential jury pool.

The question presented is whether the Michigan Supreme Court correctly held that the dismissal of petitioner's lawsuit did not violate the Free Speech Clause of the First Amendment.

RULE 29.6 STATEMENT

Ford Motor Company has no parent corporation, and no publicly held company owns 10% or more of its stock.

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BRIEF IN OPPOSITION

Respondent Ford Motor Company ("Ford") respectfully requests that the Court deny the petition for a writ of certiorari seeking review of the decision of the Michigan Supreme Court.

INTRODUCTION

In this case, the trial court dismissed with prejudice petitioner's lawsuit against Ford as the sanction for the flagrant litigation misconduct of petitioner and her counsel. The misconduct consisted of, in the Michigan Supreme Court's words, "[petitioner] and her attorneys repeatedly and intentionally publiciz[ing] inadmissible evidence so as to taint the potential jury pool, deny [respondent] a fair trial, and frustrate the due administration of justice." Pet. App. 2a. After

the trial court ruled that the prior conviction of a Ford employee was not admissible in petitioner's sexual harassment suit, petitioner and her lawyers repeatedly used press releases and media interviews to expose potential jurors to that prejudicial inadmissible information. The trial court found that the conduct of petitioner and her counsel was "intentional, premeditated, and intransigent." *Id.* at 92a.

In an effort to stave off dismissal, petitioner seeks to wrap herself in the cloak of the First Amendment. The Michigan Supreme Court rejected the notion that freedom of speech gives a litigant and her agents an unfettered right to broadcast inadmissible evidence before trial for the purpose of denying her adversary a fair trial. Although petitioner would have the Court view this as "a First Amendment case" in which she was punished for exercising her right to speak, it is in truth a case about the solemn obligation of attorneys and their clients to abide by ethical rules and evidentiary rulings and the need for trial courts to be able to sanction misconduct threatening the integrity of the proceedings. *See id.* at 1a ("In this case we consider the essential authority of trial courts to control the proceedings before them."). In *Gentile v. State Bar of Nevada,* 501 U.S. 1030 (1991), this Court held that the First Amendment does not nullify the rules of professional responsibility or the power of trial judges to police conduct of lawyers and litigants undermining the right to a fair trial—a constitutional right every bit as fundamental as freedom of speech—under the same ethical standard applied by the Michigan Supreme Court.

Because the decision below involves a fact-bound application of settled precedent, conflicts with no decision of any other court, and properly rejected petitioner's First Amendment claim, the Court should deny the petition.

COUNTERSTATEMENT

The Proceedings in the Trial Court

In June 2000, petitioner filed a state-law sexual harassment lawsuit against Ford and Daniel Bennett, alleging that Bennett had sexually harassed her. Pet. App. 3a.[1] Ford subsequently filed a motion *in limine* to exclude from trial evidence of Bennett's 1995 conviction for indecent exposure. *Id.*[2] The trial judge, Judge Kathleen Macdonald, granted the motion and entered an order dated February 16, 2001 excluding evidence of Bennett's prior conviction. *Id.*

Petitioner asserts that Judge Macdonald's order only "tentatively" excluded the evidence of Bennett's prior conviction and that "the ruling was not final." Pet. 24. These assertions are flat wrong. Judge Macdonald expressly stated that "[t]his was not a provisional ruling. This was a ruling. The motion was grant[ed] as to Mr. Bennett and to Ford Motor." Tr. of Feb. 16, 2001 Hrg. at 7. The order of exclusion took effect on February 16, 2001, and remained in effect continuously throughout the case. Indeed, based on the order, Judge Macdonald directed petitioner to file an amended complaint omitting all references to the conviction.

That order applied both in this case and in another case against Ford, pending in the same court before the same

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[1] Petitioner and Bennett are both former employees of Ford. Ford removed Bennett from the workplace in June 2000, and he never returned to work at Ford.

[2] As the Michigan Supreme Court noted, Bennett's 1995 conviction was based on conduct that took place "while Bennett was not at work and involved individuals with no connection to Ford." *Elezovic* v. *Ford Motor Co.*, 697 N.W.2d 851, 863 (Mich. 2005). Ford, of course, does not condone the conduct underlying that conviction. Its meritorious motion to exclude the conviction from evidence was necessary to protect its right to receive a fair trial of petitioner's claims, and the trial court's ruling is not at issue here.

judge, also involving Bennett's alleged workplace misconduct and in which petitioner was a plaintiff's witness ("the *Elezovic* case"). Pet. App. 3a.[3] Both the Michigan Court of Appeals and the Michigan Supreme Court denied petitioner's attempted interlocutory appeal of the trial court's evidentiary ruling. *Id.* at 3a-4a. Judge Macdonald directed a verdict against the plaintiff in the *Elezovic* case on August 30, 2001.

On September 11, 2001, as an initial trial date approached, petitioner's counsel issued a press release referring to Bennett's prior conviction and the trial court's order excluding that evidence from trial. *Id.* at 4a. In issuing the press release, petitioner's counsel knew, as the press release itself stated, that the case "will be going to trial soon." *Id.* at 96a. The September 11 press release resulted in a series of news broadcasts and print media publications "replete with references to Bennett's prior conviction." *Id.* at 4a. *See id.* at 4a n.5 (listing seven publications stemming from the September 11 press release). As the court below found, "it was [petitioner]'s counsel's press release that prompted the mass of publications." *Id.*

Petitioner subsequently moved to recuse Judge Macdonald; as a result, Judge Macdonald delayed petitioner's trial pending resolution of the recusal motion. *Id.* at 62a. In November 2001, Bennett's indecent exposure conviction was expunged. *Id.* at 5a. In January 2002, the trial court established a trial date of July 8, 2002. *Id.* In February 2002, Judge Macdonald rotated to another division of the court, and the case was reassigned to Judge William Giovan. *Id.*

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[3] At Judge Macdonald's direction, all of the witnesses in the *Elezovic* case—including petitioner—signed a statement "indicating that they had been advised of the court's ruling regarding inadmissible evidence, that they were not to mention any excluded evidence, and that they understood that sanctions would result from mentioning any excluded evidence." Pet. App. 3a n.2.

On May 17, 2002, Judge Giovan held a hearing, following which he met with all counsel to discuss petitioner's counsel's public references to Bennett's conviction. *Id.* Bennett's counsel noted that petitioner's counsel's conduct violated the state expungement statute, Mich. Comp. Laws § 780.623(5) (Pet. App. 100a), which makes it a criminal offense to "divulge[ ], use[ ] or publish[ ] information concerning" an expunged conviction. Pet. App. 5a-6a. Petitioner's counsel "responded by stating that 'it was worth the risk' to continue to publicize Bennett's expunged conviction." *Id.* at 6a. Judge Giovan declined expressly to order petitioner's counsel to obey § 780.623(5) because "he considered it redundant to order an attorney to follow the law." Pet. App. 6a.[4]

Petitioner's counsel had invited the media to the May 17 hearing. *Id.* at 5a. When Judge Giovan met privately with counsel, petitioner's counsel asked the media to wait outside the courtroom until the meeting was over. *Id.* Following the meeting, petitioner's counsel met with the waiting media. *Id.* at 6a. "This meeting resulted in extensive television news and press coverage, some of which again referred to Bennett's expunged conviction." *Id.* *See id.* at 6a n.9 (listing three publications stemming from the May 17 meeting with the media).

Petitioner's counsel continued to discuss the case in public—at a May 28, 2002 public meeting and a June 1, 2002 rally at the University of Michigan sponsored by the Coalition to Defend Affirmative Action, Integration & Immigrant Rights and Fight for Equality by Any Means Necessary, or "BAMN." *Id.* at 6a-7a. *See also* BAMN, *Third National*

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[4] Petitioner disputes the content of the meeting, claiming that the only outcome was that "the trial judge refused to rule on the validity of the [expungement] statute." Pet. 5. This is incorrect. Petitioner never sought a ruling on the statute's validity, and the "worth the risk" statement made by petitioner's counsel was indeed placed on the record. Tr. of July 8, 2002 Hrg. at 95.

Conference of the New Civil Rights Movement—Agenda (reflecting that petitioner and her attorney were scheduled to speak at the rally from 1:00-2:30 p.m.).

Following these public appearances, petitioner moved to dissolve the order that Judge Macdonald had entered excluding Bennett's prior conviction. Pet. App. 7a. Judge Giovan denied the motion, stating that "it is not a close case" and that "I'm not going to change Judge Macdonald's decision on this point." Tr. of June 21, 2002 Hrg. at 23, 25.

During the hearing on the motion, Bennett's counsel mentioned an article that had recently been published on the front page of the *Metro Times*, a free weekly publication readily available in the courthouse where jury selection was imminent. Pet. App. 7a. The following colloquy then occurred:

> THE COURT: But, you know, since you mentioned that article, where is this coming from? I thought that there is a prohibition against counsel speaking to—making public statements designed to affect litigation.
>
> MS. HARDY [Ford's counsel]: There certainly is. There's an ethics rule which prohibits counsel from intentionally trying to taint a jury pool by making the public aware of excluded evidence, which is exactly what's been occurring for quite some time.
>
> THE COURT: Is counsel being quoted in this?
>
> MR. WASHINGTON: I think counsel on both sides. Ford was not, but Mr. Morgan and Ms. Massie and I were both quoted, all quoted.
>
> THE COURT: I'm not sure—well—
>
> MS. HARDY: It was initiated, without doubt, and Mr. Washington will not dispute this, by Mr. Washington, as all the press has been initiated by his office, and the constant publicity is one issue, but the really serious issue is the effort by Mr. Washington to make sure that the press continues to report evidence or information concerning

this expunged conviction so that some way, somehow, irrespective of this Court's ruling—

THE COURT: I'm not making any decisions about this, but I'm going to tell you one thing. *If I ever reach the conclusion that somebody is violating that ethical obligation and causing some difficulty in our getting a fair jury, I will dismiss this case with prejudice*, or, and I should say, on the other side, grant a default judgment. *I just want everyone to know that.* And then whatever counsel is involved can answer to their client. [Tr. of June 21, 2002 Hrg. at 29-30 (emphases added); *see also* Pet. App. 7a-9a.]

Petitioner was present in the courtroom when the court issued this warning. Thus, the court clearly put both petitioner and her counsel on notice that any violation of ethical obligations relating to publicizing inadmissible evidence could result in dismissal of the case with prejudice.

Three days later, on June 24, 2002, petitioner in her deposition "admitted that she had disclosed facts regarding Bennett's expunged conviction despite the trial court's order disallowing such evidence." Pet. App. 9a. Petitioner said she had disclosed the conviction upwards of 100 times:

[Defense counsel]: If you can give me a ballpark figure, how many times since you found out about the expungement have you told other people about the fact that Mr. Bennett had this conviction that was later expunged?

* * *

[Petitioner]: I have no idea. It's been a lot.

Q: Over 100?

A: I don't know.

Q: Over ten?

A: Oh, definitely over ten, possibly over 100.

Q: Okay.

> A: If I could get it out on the Internet, I would put it out on the Internet. [*Id.*[5]]

Petitioner also testified that she would not stop her campaign to publicize widely Bennett's expunged conviction:

> I'm aware that you're whining and crying because I'm talking about it all over town, yes, I am aware of that. I won't shut up about it. It's the truth. You can expunge it, but it's the truth, and I'm going to tell it, and you know what? I will tell anybody that will listen because this man is a menace and must be stopped, and you know it and you know it [sic]. But you guys want to protect him, that's fine, I'm not. I don't have to protect Mr. Bennett. [*Id.* at 10a.]

On June 26, 2002—two days after petitioner's deposition and just twelve days before the trial date—petitioner and one of her attorneys participated in a "Justice for Justine Committee" demonstration outside Ford headquarters. *Id.* At the demonstration, leaflets were distributed to the public containing information about Bennett's expunged conviction. *Id.* The leaflets also stated that Judge Giovan "is in Ford's pocket" and "is trying to keep the truth out of the courtroom." *Id.* A similar demonstration was held, and similar leaflets were distributed, the next day at the Ford Wixom plant. *Id.* at 11a. The demonstrators succeeded in garnering press attention. *See id.* at 11a n.12 (listing three publications stemming from the June 26 and 27 demonstrations).

In an interview televised the same day as the demonstration at Ford headquarters, petitioner demonstrated a clear awareness of the potential consequence of her decision to continue

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[5] Petitioner discovered how to "put it out on the Internet." *See* http://www.participate.net/node/208 (last visited January 3, 2007) ("My name is Justine and I am the woman in the case below."). This weblog—dated October 11, 2005—contains a chronology publicizing the facts underlying Bennett's expunged conviction.

publicizing the expunged conviction despite the warning given by Judge Giovan at the June 21 hearing. She stated:

> If we don't act the way he [Judge Giovan] wants it, the way he sees fit, then he'll dismiss my case with prejudice. And what he doesn't know is, it doesn't bother me, because I'm not going to quit fighting against sexual harassment. [*Id.* at 10a.]

On June 28, 2002, Ford moved to dismiss petitioner's lawsuit on the ground that petitioner and her counsel had engaged in improper pretrial publicity aimed at tainting the potential jury pool. *Id.* at 11a.[6]

On July 8, 2002, at the hearing on Ford's motion to dismiss, "[petitioner] and her counsel were discourteous to and uncooperative with the court." *Id.* at 12a. For example, one of petitioner's attorneys—in response to the court's question whether she was a member of the "Justice for Justine Committee" that had publicized the excluded conviction twelve days before trial—stated "[n]obody's ever asked me that in my life" and then, interrupting the court, stated "I mean, have I or have I ever been a member of the Communist Party, is

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[6] In response, petitioner on July 1, 2002, moved to disqualify Judge Giovan; Judge Giovan denied the motion, and the chief judge affirmed that ruling, Pet. App. 11a, which was upheld by the Michigan Court of Appeals on that ground that it saw "nothing in the record [that] indicates that Judge Giovan acted with prejudice or impropriety." *Id.* at 76a-77a.

On July 3, 2002, the day the disqualification motion was denied, one of petitioner's attorneys gave a television interview in which she stated: "Metro Detroit has a company town feeling, and it's hard to get a fair hearing from any of these judges when you're going against the Ford Motor Company. They'll stop at nothing to maintain the culture of abuse that exists in those plants, and we've found it hard to get unbiased judicial rulings in these cases." *Id.* at 11a. This interview generated still more media coverage. *See id.* at 11a n.13 (listing two publications resulting from the interview).

that what this is?" Tr. of July 8, 2002 Hrg. at 114; Pet. App. 12a. Following the court's question whether members of the organization were in court, the same attorney said "[h]ave you guys even ever heard of the phrase 'Freedom of association?' " Tr. of July 8, 2002 Hrg. at 117; Pet. App. 12a. The attorney also turned to the "Justice for Justine Committee" members present in the courtroom and remarked "[w]ho did you guys vote for in the last judicial election?" *Id.*

The same attorney belittled Ford's motion to dismiss as "12 pages of tripe," "very frivolous" and "frankly stupid." Tr. of July 8, 2002 Hrg. at 102, 104. Earlier in the hearing, she indicated that she saw nothing wrong with petitioner's June 26 television interview. The attorney stated that "contrary to being lambasted for it, she [petitioner] should be commended for not stopping despite whatever Judge might rule in any way that she disagrees with." *Id.* at 97.

Another of petitioner's attorneys, during the same hearing, was similarly disrespectful to the court, saying "Judge Giovan, I haven't been accused of lying since my age was in the single digit. But I'll tell you something, I don't give a fig, because whatever you may think of my dishonesty, you can multiply that by 10." Tr. of July 8, 2002 Hrg. at 18. Her rude behavior included interruption of the Court's questioning. *See id.* at 15 ("THE COURT: Do you mind if I finish my—. MS. MASSIE: (Interposing) You didn't give me a chance to reply to Ms. Hardy.").

On August 21, 2002, the trial court dismissed petitioner's lawsuit with prejudice, agreeing with Ford's argument that

> both [petitioner] herself and her attorneys have intentionally and repeatedly disseminated the proscribed evidence through the public media when they knew or should have known that the information would have a substantial likelihood of tainting the trial of this action. [Pet. App. 83a.]

The trial court concluded that the behavior of petitioner and her attorneys "has been intentional, premeditated, and

intransigent. It was designed to reach the farthest boundaries of the public consciousness." *Id.* at 92a. *See also id.* at 89a (referring to "the willfulness of their conduct"). The trial court based its ruling in large part on Mich. R. Prof. Conduct ("MRPC") 3.6:

> A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding. [Pet. App. 103a.]

In well-supported factual findings, the trial court found that petitioner "publicly disclosed the fact of [Bennett's] conviction many times"; that she "made these public disclosures while aware of Judge Macdonald's exclusionary order" and while "aware of the illegality of such disclosures"; and that "nothing will deter [petitioner] from continuing to publicly broadcast that information." *Id.* at 83a, 84a, 85a.

The trial court also concluded that petitioner's counsel had much "to answer for themselves." *Id.* at 87a. Among other things, the court found that on September 11, 2001, petitioner's counsel issued a press release "which made several explicit references to Mr. Bennett's criminal conviction, the underlying conduct involved, and to the fact that Judge Macdonald had excluded these from evidence" and did so "while believing that the trial was imminent." *Id.* The court found that petitioner's attorneys provided to a reporter the "extensive information * * * about Mr. Bennett's conviction and the underlying behavior" that appeared in the front-page story in the *Metro Times* in June 2002—a charge that petitioner's lawyers did "not deny." *Id.* at 88a. The court also noted that MRPC 8.4(a) prohibited petitioner's counsel from acting together with petitioner or anyone else to effectuate the prejudicial pretrial publicity. *Id.*

The Decision of the Michigan Court of Appeals

In April 2004, the Michigan Court of Appeals affirmed in part, reversed in part, and remanded in part. *Id.* at 60a-80a. It held that the trial court "possessed the legal authority to dismiss [petitioner]'s complaint with prejudice on the basis that [petitioner] and her attorneys intentionally and repeatedly disclosed excluded evidence through the public media for the purpose of tainting the jury pool so as to deny [Ford] a fair trial." *Id.* at 67a. The court remanded the case, however, on the ground that the trial court "did not conduct an extensive evidentiary hearing to specifically determine whether the conduct of [petitioner] and her attorneys caused any prejudice to [Ford's] right to a fair trial." *Id.* at 69a.

The Court of Appeals also ruled, following *Elezovic* v. *Ford Motor Co.*, 673 N.W.2d 776 (Mich. Ct. App. 2003), *aff'd in part & rev'd in part*, 697 N.W.2d 851 (Mich. 2005), that the trial court had properly and without committing error excluded evidence of Bennett's prior conviction. Pet. App. 70a-72a. Although the Michigan Supreme Court declined to review the issue in petitioner's case, that court ultimately upheld, in the *Elezovic* case, the original ruling that Bennett's prior conviction was inadmissible. *See Elezovic* v. *Ford Motor Co.*, 697 N.W.2d 851 (Mich. 2005). The court held that the expungement statute, Mich. Comp. Laws § 780.623(5), made the fact of the conviction itself inadmissible. *Elezovic*, 697 N.W.2d at 863. The court also held that the "facts that led to the conviction" could not be admitted to show that Ford knew its work environment was hostile because the conviction "occurred while Bennett was not at work and involved individuals with no connection to Ford." *Id.* The court "question[ed] how Ford's knowledge of Bennett's improper off-site behavior involving nonemployees could constitute notice to Ford that plaintiff's work environment was sexually hostile." *Id.*

The Decision of the Michigan Supreme Court

The Michigan Supreme Court reversed the Court of Appeals' judgment and reinstated the order dismissing petitioner's complaint. Pet. App. 3a, 30a. The Supreme Court held that the trial court had authority, as a matter of Michigan law, to impose such a sanction for the misconduct of a party and her attorneys and that the trial court had properly exercised its discretion on the facts here. As the court stated:

> [Petitioner] and her counsel engaged in a concerted and wide-ranging campaign in the weeks before various scheduled trial dates to publicize the details of the inadmissible evidence through the mass media and other available means. They continued to do so even after the trial court explicitly warned them that such misconduct would result in the dismissal of [petitioner]'s lawsuit. [*Id.* at 18a.]

The Michigan Supreme Court concluded that the trial court "chose a principled option in dismissing [petitioner]'s case in order to protect the administration of justice," adding that "[t]he imposition of any lesser sanction would have been unjust in light of [petitioner]'s and her counsel's flagrant misbehavior." *Id.* at 21a.

The Michigan Supreme Court also rejected petitioner's First Amendment argument—the only federal issue in the case. *Id.* at 24a-28a. Carefully applying this Court's opinion in *Gentile* v. *State Bar of Nevada*, 501 U.S. 1030 (1991), the court below held that the dismissal of petitioner's lawsuit did not violate the freedom of speech. In so holding, the court correctly recognized that the speech at issue "was substantially likely to have a materially prejudicial effect and * * *, therefore, violated the rules of ethics." Pet. App. 26a. It also observed, again quite correctly, that the trial court's rulings "were necessary to protect [Ford's] fundamental right to a

fair trial and were directly aimed at protecting potential jurors from prejudice." *Id.* at 27a.[7]

REASONS FOR DENYING THE WRIT

It should be noted at the outset that a number of the rulings made below are not at issue in this Court, for they involve questions of state law. *See Dixon* v. *Duffy*, 344 U.S. 143, 144 (1952) ("This Court, of course, does not sit to determine matters of state law"). Those include (1) the ruling—made by the trial court, affirmed by the Michigan Court of Appeals, and settled by the Michigan Supreme Court in the *Elezovic* case—that Bennett's prior conviction was inadmissible, and (2) the Michigan Supreme Court's ruling that the dismissal of petitioner's case as a sanction for the deliberate, repeated, and flagrant misconduct of petitioner and her attorneys was a lawful and proper exercise of the trial court's discretion as a matter of Michigan law. The only *federal* question before this Court is whether the dismissal violated the First Amendment. That question does not warrant review by this Court, for a number of compelling reasons.

I. THE QUESTION WHETHER THE COURT BELOW PROPERLY APPLIED *GENTILE* ON THE UNUSUAL FACTS OF THIS CASE DOES NOT WARRANT THIS COURT'S REVIEW.

The First Amendment question raised in this case is a quite narrow one, because there is no dispute as to the proper test to be applied to answer that question in this context. Under this Court's decision in *Gentile* v. *State Bar of Nevada*, 501 U.S. 1030 (1991), the question is whether the extra-judicial speech at issue is substantially likely to have a materially

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[7] Petitioner suggests that the Michigan Attorney Grievance Commission exonerated her counsel of any ethical wrongdoing. *See* Pet. 21 n.8. That is incorrect. The Commission simply made a decision to allocate scarce prosecutorial resources elsewhere.

prejudicial effect upon the trial. *Id.* at 1075.[8] If the answer is yes, the speech may be regulated without running afoul of the First Amendment. The trial court, the Michigan Court of Appeals, the Michigan Supreme Court, and the principal dissenting opinion all applied the "substantial likelihood of material prejudice" test of *Gentile* or recognized that it was controlling. *See* Pet. App. 24a-30a (majority opinion of the Michigan Supreme Court); *id.* at 31a-32a, 42a (dissenting opinion of Justice Cavanagh); *id.* at 68a-70a (Michigan Court of Appeals opinion); *id.* at 90a, 92a (trial court opinion).

The Michigan Supreme Court divided, not over the applicability of the *Gentile* test, but over the outcome of applying that test on this record. *Compare id.* at 29a ("We * * * fail to see how [petitioner's] and her counsel's numerous public references to Bennett's prior indecent exposure conviction * * * did not have a substantial likelihood of materially prejudicing this sexual harassment proceeding.") *with id.* at 32a ("The conduct of [petitioner] and her attorneys was not substantially likely to materially prejudice the trial.") (Cavanagh, J., dissenting). The Court of Appeals would have remanded for further proceedings under *Gentile*. *See id.* at 70a (remanding for "a full evidentiary hearing" on "the 'substantial likelihood' test in *Gentile*"). And the trial court ruled that the information disseminated by petitioner and her counsel "would have a substantial likelihood of tainting the trial of this action." *Id.* at 83a. *See also id.* at 90a (*Gentile* "affords no refuge" to petitioner because "the decision did not affect the constitutionality of provisions that forbid speech by attorneys that will have a substantial likelihood of materially prejudicing an adjudicative proceeding").

Petitioner contends that the court below failed correctly to apply *Gentile*, and her argument consists in large measure of

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[8] Except as otherwise noted, all of the citations to *Gentile* herein are to portions of the opinion of the Court authored by Chief Justice Rehnquist.

claims that the Michigan Supreme Court erred in its understanding or recitation of the pertinent facts. *See* Pet. 5 n.3, 10, 16, 23-24. For example, petitioner accuses the court below of "ignoring the actual facts" regarding the public statements that she and her counsel made. *Id.* at 23. She also asserts that it is "factually untrue" that later media accounts of Bennett's conviction stemmed from the September 11 press release. *Id.* at 16.

But this Court generally does not use its certiorari power to consider such contentions. *See* S. Ct. R. 10 ("A petition for certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). All three of the courts below agreed that *Gentile* applied in this case, and petitioner does not contend otherwise.[9] The fact-bound application of the *Gentile* test in this case does not warrant further review.

II. THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISION OF ANY OTHER COURT.

Petitioner contends that a court must hold a hearing, consider certain matters, make findings of fact, and then issue an appropriate order "*before* a court may restrain parties or their attorneys from making public statements about a pending case." *Id.* at 14 (emphasis in original). In support of that contention, petitioner cites a long string of federal and state

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[9] While not disputing that *Gentile* is controlling here, petitioner relies heavily upon *Bridges* v. *California*, 314 U.S. 252 (1941). *See* Pet. 12-13, 22-23. The question in that case was whether the contempt power may be used to punish the media for extra-judicial statements. In *Gentile*, the petitioner, relying on *Bridges* and other cases, urged the Court to adopt a "clear and present danger" standard, but the Court declined to do so, thereby limiting the reach of *Bridges*. *Gentile*, 501 U.S. at 1069. *Gentile*, not *Bridges*, controls in this case.

cases, Pet. 14-15, none of which she discusses in any detail, that she claims conflict with the decision below. Not so.

Almost none of petitioner's cases apply to the situation presented here, for those cases involve the standard for imposing a *prior restraint* on the speech of trial participants and media observers—what is pejoratively called in this context a "gag order."

For example, in petitioner's lead case, *Chase* v. *Robson*, 435 F.2d 1059 (7th Cir. 1970) (*per curiam*), the district court ordered the defendants, their counsel, and the Government to "make or issue no statements, written or oral, either at a public meeting or occasion, or for public reporting or dissemination in any fashion" regarding the jury, the evidence, the witnesses, the court's rulings, or the merits of the case. *Id.* at 1060. This order was, of course, a prior restraint. *See id.* at 1062 ("The order of the district court imposes a prior restraint on protected first amendment conduct").

Similarly, in *United States* v. *Salameh*, 992 F.2d 445 (2d Cir. 1993) (*per curiam*), another case on which petitioner relies, the district court issued an order "barring counsel for all parties to the present action from publicly discussing any aspect of the action." *Id.* at 446. This order, too, was a prior restraint. *See id.* ("An order that prohibits the utterance or publication of particular information or commentary imposes a 'prior restraint' on speech."). Nearly all of petitioner's other cases also involved prior restraints.[10]

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[10] *See United States* v. *Noriega*, 917 F.2d 1543, 1545 (11th Cir.) ("This case [involves] * * * CNN's First Amendment right to be free from prior restraints against the broadcasting of newsworthy information."), *cert. denied*, 498 U.S. 976 (1990); *Bailey* v. *Systems Innovation, Inc.*, 852 F.2d 93, 98 (3d Cir. 1988) ("Moreover, this order is a prior restraint on speech"); *Levine* v. *U.S. Dist. Ct. for Cent. Dist. of Cal.*, 764 F.2d 590, 595 (9th Cir. 1985) ("[T]he district court's order is properly characterized as a prior restraint."), *cert. denied*, 476 U.S. 1158 (1986); *CBS Inc.* v. *Young*,

This Court clarified the definition of a "prior restraint" in *Alexander* v. *United States*, 509 U.S. 544 (1993). There, the Court explained that "[t]he term prior restraint is used 'to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.' " *Id.* at 550 (quoting M. NIMMER, NIMMER ON FREEDOM OF SPEECH § 4.03, at 4-14 (1984) (emphasis omitted)). In so doing, the Court emphasized that "our decisions have steadfastly preserved the distinction between prior restraints and subsequent punishments." *Id.* at 553-554. *See also id.* at 553 (reaffirming the "time-honored distinction between barring speech in the future and penalizing past speech").

The *Alexander* Court also explained that the distinction between a prior restraint on future speech and punishment subsequent to speech "is critical to our First Amendment jurisprudence" because "we have interpreted the First Amendment as providing greater protection from prior restraints than from subsequent punishments." *Id.* at 554 (citing *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 558-559 (1975)). "Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Southeastern Promotions*, 420 U.S. at 559 (emphasis in original).

There is no conflict between the prior restraint cases that petitioner cites and the decision below—nor could there be—because the instant case does not involve a prior restraint.

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522 F.2d 234, 239 (6th Cir. 1975) (*per curiam*) ("Examining the May 6 order * * * we think the conclusion is inevitable that it constitutes a prior direct restraint upon freedom of expression."); *Twohig* v. *Blackmer*, 918 P.2d 332, 335 (N.M. 1996) ("An order such as the one issued here * * * is a prior restraint."); *Kemner* v. *Monsanto Co.*, 492 N.E.2d 1327, 1337 (Ill. 1986) ("[T]he April 2 order constitutes an impermissible prior restraint on Monsanto's right of free speech.").

Petitioner and her attorneys were never subjected to a "gag order" or ordered not to speak. *See* Pet. App. 19a n.22, 67a, 88a n.4. Her lawsuit was dismissed as a sanction after she and her attorneys violated longstanding and well-known ethical rules by jointly and intentionally engaging in a campaign to publicize inadmissible evidence and thereby taint the potential jury pool. This Court in *Gentile* specifically ruled that such regulation comports with the First Amendment, holding that the substantial likelihood of material prejudice standard furthers the state's "substantial interest" in fair trials and is "narrowly tailored" to that end. *Gentile*, 501 U.S. at 1075, 1076. Thus, this case does not involve a prior restraint on speech but a *subsequent punishment* for violating settled and constitutional standards regulating the pre-trial speech of those participating in litigation.

Notably, the last case that petitioner cites (with a "see also" signal) did not involve a prior restraint, and it proves the point that the First Amendment permits a court to impose sanctions for past speech even if the sanctions were not preceded by the kind of process or court order that petitioner contends is necessary. *See Attorney Grievance Comm'n of Md.* v. *Gansler*, 835 A.2d 548 (Md. 2003). In that case, Maryland's highest court sanctioned a state prosecutor for making public statements that the lawyer knew or reasonably should have known would have a substantial likelihood of materially prejudicing an adjudicative proceeding. As in this case, there was no prior restraint on speech in *Gansler*; the sanctions were imposed based on past speech. In so doing, the court applied *Gentile*. *See Gansler*, 835 A.2d at 564-566.

As *Gansler* shows, the First Amendment does not require a court to issue a gag order before it imposes sanctions for litigation misconduct or unethical behavior. *See also, e.g., In re Morrissey*, 168 F.3d 134 (4th Cir.), *cert. denied*, 527 U.S. 1036 (1999).[11] Indeed, for confirmation of this point one

[11] In *Morrissey*, an attorney held a press conference at which he questioned the credibility of a witness, in violation of a local rule.

need look no further than *Gentile*. There was no gag order in *Gentile*, which is not surprising since the attorney speech at issue was delivered at a press conference held the day after the attorney's client was indicted. No member of the Court suggested in *Gentile* that the attorney could not be sanctioned unless he had first been subjected to a gag order.

Because this case involves a subsequent punishment for violating the ethical standard upheld in *Gentile*, petitioner was not entitled to the greater protection afforded by the First Amendment in prior restraint cases, such as those on which petitioner relies. Thus, almost all of petitioner's case law is simply inapposite here, and there is no conflict with the decisions of this Court or any other court.

III. THE SUPREME COURT OF MICHIGAN CORRECTLY HELD THAT THE DISMISSAL OF PETITIONER'S CASE AS A SANCTION FOR LITIGATION MISCONDUCT DID NOT VIOLATE THE FIRST AMENDMENT.

Review should also be denied because the court below was correct to hold that the dismissal of petitioner's case as sanction for the flagrant misconduct of petitioner and her attorneys did not violate the First Amendment.

The First Amendment is not the only constitutional right at stake in this case. Respondent has a right to due process, which encompasses the subsidiary right to a fair trial by an impartial jury. *See Weiss* v. *United States*, 510 U.S. 163, 178 (1994) ("It is elementary that 'a fair trial in a fair tribunal is a basic requirement of due process.' ") (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).[12]

His punishment included 90 days' imprisonment, three years' probation, and two years' suspension from practice. There was no gag order in place when the attorney held the press conference.

[12] The right to a fair trial obtains in both civil and criminal cases. *See, e.g., Davidson* v. *Riley*, 44 F.3d 1118, 1122 (2d Cir. 1995).

"This Court has long recognized that adverse publicity can endanger the ability of a defendant to receive a fair trial." *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 378 (1979). Because of the dangers posed by pretrial publicity, a trial judge has "an affirmative constitutional duty" to ensure that "the fairness of a trial will not be jeopardized by the dissemination of [prejudicial inadmissible] information throughout the community before the trial itself has even begun." *Id.* at 378, 379.[13] "Paramount among these dangers is the potential that pretrial publicity may taint the jury venire, resulting in a jury that is biased toward one party or another." *United States* v. *Brown*, 218 F.3d 415, 423 (5th Cir. 2000), *cert. denied*, 531 U.S. 1111 (2001).

It is a fundamental precept of the American legal system that lawsuits are to be tried in court, not the media. *See Bridges*, 314 U.S. at 271 ("The very word 'trial' connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper."); *Patterson* v. *Colorado ex rel. Attorney General of Colo.*, 205 U.S. 454, 462 (1907) (Holmes, J.) ("The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."); *see also Pennekamp* v. *Florida*, 328 U.S. 331, 359 (1946) (Frankfurter, J., concurring) (discussing the problem of "trial by newspapers").

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[13] *See also Gentile*, 501 U.S. at 1075 ("Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors, and an outcome affected by extrajudicial statements would violate that fundamental right."); *Sheppard* v. *Maxwell*, 384 U.S. 333, 362 (1966) (due process demands "a trial by an impartial jury free from outside influences" especially given "the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors").

In balancing the competing interests of free speech and fair trials, this Court in *Gentile* held that the same ethical standard applied by the Michigan Supreme Court under Rule 3.6—a standard prohibiting speech that an attorney knew or should have known created a "substantial likelihood of material prejudice" in a pending proceeding—strikes a constitutionally permissible balance. *See* 501 U.S. at 1075 ("We agree with the majority of the States that the 'substantial likelihood of material prejudice' standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials."). That holding covers Rule 3.6 and the standard applied by the Michigan Supreme Court. *See Gentile*, 501 U.S. at 1068 n.1. Thus, petitioner's argument that *Gentile* "struck down standards like those in Michigan's Rule 3.6 as void for vagueness" (Pet. 19) is simply incorrect. *Gentile* did not strike down the Nevada rule as void for vagueness. Rather, it held only that the rule was vague *as applied* to the specific speech in that case.

Petitioner can raise no plausible argument that the "substantial likelihood" standard is vague as applied to the speech for which she was sanctioned—a deliberate campaign to publicize evidence that had been ruled inadmissible at trial. This type of speech long has been recognized as creating a substantial likelihood of prejudice and falls within the core of the prohibition embodied in Rule 3.6 and upheld in *Gentile*. When inadmissible evidence is disseminated through the organs of mass communication, the risk of a tainted jury is grave. For "the exclusion of such [inadmissible] evidence in court is rendered meaningless when news media make it available to the public." *Sheppard*, 384 U.S. at 360. As this Court said in *Gentile*, "[e]xtrajudicial comments on, or discussion of, evidence which might never be admitted at trial * * * obviously threaten to undermine [a] basic tenet" of our legal system—namely, that a trial "is to be decided by impartial jurors * * * based on material admitted into evidence before them in a court proceeding." 501 U.S. at 1070.

The kind of inadmissible evidence at issue in this case—prior conviction evidence—can be especially prejudicial. *See, e.g.*, Fed. R. Evid. 404(b); Mich. R. Evid. 404(b). Indeed, in *Marshall* v. *United States*, 360 U.S. 310 (1959), this Court, exercising its supervisory power, granted a new trial to a criminal defendant because of publicity given to such evidence. The Court vacated the defendant's conviction for the unlicensed dispensing of drugs because of the publication of two newspaper articles disclosing that he had previously practiced medicine without a license—evidence that the trial court had ruled inadmissible—and had a prior conviction for forgery. This Court stated:

> We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is part of the prosecution's evidence. It may indeed be greater for it is then not tempered by protective procedures. [*Id.* at 312-313 (citation omitted).]

See also Irvin v. *Dowd*, 366 U.S. 717, 725 (1961) (vacating conviction because pretrial publicity, including press stories referring to prior criminal record, tainted jury pool).

The First Amendment confers no right upon a litigant or her attorneys to taint the potential jury pool by deliberately publicizing inadmissible evidence and thereby deny the defendant's right to a fair trial. As Justice Frankfurter said:

> [I]n a particular controversy pending before a court and awaiting judgment, human beings, however strong, should not be torn from their moorings of impartiality by the undertow of extraneous influence. In securing freedom of speech, the Constitution hardly meant to create the right to influence judges or juries. That is no more freedom of speech than stuffing a ballot box is an exercise of the right to vote. [*Pennekamp*, 328 U.S. at 366 (concurring opinion).]

Here, once the trial court ruled that Bennett's prior conviction was inadmissible, petitioner and her counsel had no right to undermine that evidentiary ruling by publicizing the conviction through the media. *See Gentile*, 501 U.S. at 1071 ("An attorney may not, by speech or other conduct, resist a ruling of the trial court beyond the point necessary to preserve a claim for appeal."); *Fisher* v. *Pace*, 336 U.S. 155, 161 (1949) ("Counsel are required to confine their arguments to the evidence and must not touch upon matters withdrawn from the consideration of the jury."). The First Amendment did not bar the trial court from sanctioning that misconduct. *See Sheppard*, 384 U.S. at 363 ("Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.").

Petitioner argues that the First Amendment gave her a right to publicize Bennett's conviction because the conviction was a matter of public record. *See* Pet. 20 & n.7, 23. But the fact that inadmissible evidence might be available to the media in other ways cannot absolve attorneys of their ethical obligation to avoid making statements that are "designed to reach the farthest boundaries of the public consciousness" for the specific purpose of tainting the jury pool. Pet. App. 92a. As this Court noted in *Gentile*, " '[o]bedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech.' " 501 U.S. at 1071 (quoting *In re Sawyer*, 360 U.S. 622, 646-647 (1959) (Stewart, J., concurring in the result)). The Court also quoted Justice Brennan's statement that " '[a]s officers of the court, court personnel and attorneys have a fiduciary duty not to engage in public debate that will * * * obstruct the fair administration of justice.' " *Gentile*, 501 U.S. at 1074 (quoting *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 601 n.27 (1976) (Brennan, J., concurring in the judgment)). *See also Gentile*, 501 U.S. at 1081-82 (O'Connor, J., concurring) ("Lawyers are officers of the court and, as such, may legitimately be subject to ethical precepts that keep them from

engaging in what otherwise might be constitutionally protected speech."). The *Gentile* Court accordingly held that "the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press." 501 U.S. at 1074.

Petitioner's "public record" argument also ignores the state expungement statute, which operated in November 2001 to convert Bennett's conviction into a "nonpublic record"—a record exempt even from the state freedom of information act. *See* Mich. Comp. Laws §§ 780.623(2), (4) (Pet. App. 99a-100a). In addition, Michigan law expressly defines the term "public record" to exclude documents "prepared, owned, used, in the possession of, or retained by" the judiciary. Mich. Comp. Laws §§ 15.232(d)(v), (e).

Petitioner also seeks to distinguish her conduct from that of her attorneys by arguing that "she had no reason to suspect that the trial court's June 21 comments restricted her statements to the media." Pet. 17-18. But not only did petitioner's attorneys engage in their own independent violations of Rule 3.6, the courts below specifically found that petitioner acted in concert with her attorneys to violate Rule 3.6 and taint the jury pool. Another rule, Rule 8.4(a), informed petitioner and her lawyers that they could not circumvent Rule 3.6 by having petitioner do that which her lawyers could not. *See* MRPC 8.4(a) ("It is professional misconduct for a lawyer to * * * knowingly assist or induce another to [violate the rules of conduct], or do so through the acts of another") (Pet. App. 106a).

Here, as the court below explained, petitioner's counsel "not only failed to restrain [petitioner] from repeatedly and intentionally publicizing Bennett's inadmissible expunged conviction in order to taint the potential jury pool and deny [Ford] a fair trial, they participated with [her] in the misconduct on numerous occasions." Pet. App. 24a. From Rule 8.4(a), petitioner and her lawyers knew, for example, that they should not have taken part in the June 26, 2002 "Justice

for Justine Committee" demonstration at which "participants distributed leaflets to the public containing information regarding Bennett's expunged conviction." Pet. App. 10a.[14]

By choosing to file a lawsuit against Ford, petitioner accepted certain limitations upon her ability to speak while the case was ongoing. Petitioner's counsel was likewise restricted when that counsel agreed to represent her. "Although litigants do not 'surrender' their First Amendment rights at the courthouse door, those rights may be subordinated to other interests that arise in this setting." *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 32-33 n.18 (1984) (internal quotation marks and citation omitted) (quoted with approval in *Gentile*, 501 U.S. at 1073). The First Amendment permits such limitations, in part because they are temporary; they generally last only until the conclusion of the trial and post-trial proceedings. *See Pennekamp*, 328 U.S. at 346 ("It does not follow that public comment of every character upon pending trials or legal proceedings may be as free as a similar comment after complete disposal of the litigation."). The First Amendment also tolerates such limitations because they are necessary to the conduct of a fair trial. *See Estes* v. *Texas*, 381 U.S. 532, 540 (1965) ("We have always held that the atmosphere essential to the preser-

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[14] There was also no question about the possible consequences of violating the restrictions. Petitioner and her counsel were told by the trial judge: "If I ever reach the conclusion that somebody is violating that ethical obligation and causing some difficulty in our getting a fair jury, I will dismiss this case with prejudice, or, and I should say, on the other side, grant a default judgment. I just want everyone to know that. And then whatever counsel is involved can answer to their client." Tr. of June 21, 2002 Hrg. at 29-30; *see also* Pet. App. 7a-9a. And petitioner stated publicly that "[i]f we don't act the way he [Judge Giovan] wants it, the way he sees fit, then he'll dismiss my case with prejudice. And what he doesn't know is, it doesn't bother me * * *." Pet. App. 10a.

vation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs.").

In a footnote, petitioner objects that "the trial court in this case did not even consider whether there was in fact any prejudice to the defendant's right to a fair trial." Pet. 14 n.4. But the court below correctly rejected a "requirement that actual prejudice be shown." Pet. App. 28a. The inquiry under *Gentile* is whether the public comments at issue "are likely to prejudice the jury venire, even if an untainted panel can ultimately be found." 501 U.S. at 1075. The petitioner in *Gentile* argued that "there must be a finding of 'actual prejudice or a substantial and imminent threat to a fair trial,' " but this Court held that "the 'substantial likelihood of material prejudice' standard applied by Nevada and most other States satisfies the First Amendment." *Id.* at 1063. The court below applied that exact standard in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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